do not think the failure to prove those facts independently is highly significant. He was not challenged on these points but his wife would have no means of contesting them. In custody proceedings in England he gave evidence that his domicil was in Singapore but I attach no weight to that. In answer to my question as to his having taken advice on the issue of domicil he said that none of the lawyers he had consulted were able to make the matter clear to him. He thought they did not understand it themselves.

A point often overlooked is that a finding that a man has a domicil of choice may be embarrassing to his children at a later date.

Also, the question is of practical importance to the wife at the present time but she is as likely as he is to be biassed. The party alleging a domicil of choice must convince the Court, irrespective of the attitude of the opposite side.

The place of residence of a man's wife and children is an important factor but where the marriage has broken down the residence of the wife loses its significance. Thirty years ago it was unusual for European children to remain in Malaya beyond the age of seven but now that there are schools, especially at the Hill Stations, they stay much longer. The petitioner will probably send his daughter to England for four or five years for secondary education but girls in their later teens commonly rejoin parents resident in Malaya. Widening fields of employment are open to them and the social amenities of Singapore are attractive to many young women. There is therefore nothing odd or impractical in the view that the petitioner sincerely intends to make a permanent home here for himself and one or both of his daughters.

On the whole I am of opinion that in the exceptional circumstances of this petitioner's residence in the Colony, and having regard to family and economic factors it is highly probable that he has resolved to remain here indefinitely and, after some hesitation, I have accepted his evidence that that is his state of mind.

An immigrant who comes to make his fortune and then retire to some other country intends to reside indefinitely because it is impossible to say how long it will take him to accumulate the amount required. His intended residence is of indefinite duration but the purpose is transient. In such a case the domicil of origin survives.

To establish a domicil of choice it is necessary to adduce clear proof of two separate and independent facts, one concrete or physical and the other abstract or psychological.

There must be actual residence for an indefinite period and there must also be an intention to remain so firm and positive as to exclude any intention to make an ultimate home in another jurisdiction.

I am of opinion that this petitioner fulfils those requirements. The petition must therefore be set down for trial on the other issues.

Order accordingly.

Solicitors: *Braddell Bros; Sisson & Delay.*

BANK OF CHINA v. BRUSGAARD KIOSTERUD & CO.; and THE BANK OF EAST ASIA LTD.; and THONG LEE TRADING CO. Third Parties.

[O. C. J. (Whyatt C.J.) January 20, 1956]

[Singapore — Suit No. 594 of 1954]

Bills of Lading Act, 1855, ss. 1 & 3 — Claim for damages for failing to deliver goods stated in bill of lading — Whether bank to whom the goods are pledged can sue on bill of lading — Whether owners of vessel are estopped from denying the contents of the packages shipped on the vessel.

This was a claim by the plaintiffs against the defendants, the owners of the S.S. Helios for damages for failing to deliver to them in Singapore certain goods which they alleged were shipped at Hong Kong by that vessel for carriage to Singapore upon the terms stated in a bill of lading dated March 20, 1953. It was argued on behalf of the plaintiffs that (a) they were entitled to sue the defendants on the bill of lading by virtue of section 1 of the Bills of Lading Act and (b) the defendants were estopped by section 3 of the same Act from denying that the contents of the packages were as described in the bill of lading.

Held: (1) on the facts the plaintiffs had failed to discharge the onus of proof which rested on them of proving the contents of the packages mentioned in the bill of lading and the value of those packages; (2) the correct inference from the conduct of the plaintiffs and the shipper of the goods in this case was that the shipper was to effect a pledge of the goods to the banks and therefore the plaintiffs cannot rely upon section 1 of the Bills of Lading Act, 1855 and consequently they cannot sue the defendants on the bill of lading; (3) as the bill of lading in this case was not signed by the defendants but by the agents for the defendants in Hong Kong as shipping agents, the defendants did not incur any liability under section 3 of the Bills of Lading Act.

Cases referred to:—

(1) *Sewell v. Burdick* (1884) 10 A.C. 74.

(2) *The Prinz Adalbert* (1917) A.C. 586.

(3) *Thorman v. Burt* (1886) 54 L.T. 394.

(4) *Bontex Knitting Works v. St. John's Garage* (1943) 2 All E.R. 690.
(5) *Lilley v. Doubleday* 7 Q.B.D. 570.
(6) *Woolf v. Collie Removal Services* (1948) 1 K.B. 11.
(7) *The Marlborough Hill* (1921) A.C. 44.

CIVIL SUIT for Damages.

C. H. Smith for the plaintiffs.

H. G. H. Sparrow for the defendants.

T. W. Ong for 3rd Parties.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Whyatt C.J. : — This is a claim by the Bank of China against the owners of the S. S. Helios for damages for failing to deliver to them in Singapore certain goods which they allege were shipped at Hong Kong by that vessel for carriage to Singapore upon the terms stated in a Bill of Lading dated the 20th March 1953. The defendants joined as Third Parties, a Chinese firm, named the Thong Lee Trading Co. and the Bank of East Asia, on the ground that they had agreed to indemnify the defendants against the consequences of delivering the goods in question without production of the relevant bill of lading. The Thong Lee Trading Company, however, are now bankrupt and they have not entered an appearance in these proceedings. The Bank of East Asia, on the other hand, entered an appearance and took part in the proceedings until the sixth day of the trial which lasted altogether seven days when they and the defendants informed the Court that the differences between them had been settled and consequently they would take no further part in the proceedings. Accordingly the only claim which remains to be considered and determined is the claim of the Bank of China against the owners of the S. S. Helios.

The claim, besides raising several questions of law, raises two very important questions of fact, namely, what were the contents of the 400 packages which the plaintiffs allege the defendants failed to deliver to them on arrival of the Helios in Singapore, and what was the value of the packages. The plaintiffs allege that the packages contained salted vegetables, salted eggs, paper, preserved fruits, oyster sauce, cuttle fish and joss sticks to the total value of approximately $30,000. The defendants challenge this allegation and maintain that the plaintiffs have not satisfactorily proved what the packages contained, still less what they were worth. These major issues of fact have been strenuously contested throughout the case, and although it may not be in logical sequence to deal with them before considering certain questions of law which involve, *inter alia*, the plaintiffs' right to sue on this bill of lading at all, I think it will, nevertheless, be more convenient to deal with the issues of fact at the outset of this judgment.

The plaintiffs' case, so far as it relates to these two issues of fact, may be summarised as follows. In March 1953, the Thong Lee Trading Company of Singapore who were importers of China produce, placed an order by letter with the Sing Yuen Co. of Hong Kong for salted vegetables, salted eggs, preserved plums and other Chinese products. Subsequently they received a telegram from Sing Yuen stating what quantities and types of goods had been supplied against their order but making no mention of prices. Sing Yuen shipped the goods by the Helios on the 20th March 1953 and took the shipping documents, that is to say, the bill of lading, the invoice, the insurance policy and a draft for $29,999.78 drawn by them on Thong Lee for the invoice price of the goods, to the plaintiff bank in Hong Kong. They handed over the shipping documents to the bank and the bank then paid them the amount of the draft. The bank forwarded the documents to their branch in Singapore where they arrived about the 25th March. The bank's bill clerk took the documents round to Thong Lee's place of business, obtained Thong Lee's acceptance to the draft on the 26th March, and then took them back to the bank to be held until Thong Lee paid the draft and took up the documents.

In the meantime Thong Lee were busying themselves in other directions. On the 24th March they made an application to the Import & Export Department for an import permit for these goods and in support of their application, prepared certain documents and made certain declarations on the basis of a telegram they say they had received from Sing Yuen which it will be necessary to refer to in more detail presently. The application was approved and the necessary import permit issued. Concurrently with their approach to the Import & Export Department, Thong Lee submitted a written request to the Bank of East Asia asking them to issue a letter of indemnity to the owners of the Helios to enable them to obtain delivery of the goods without producing the relevant bill of lading. The Bank of East Asia issued the letter of indemnity on the 24th March and armed with this document Thong Lee obtained delivery of the goods from the Helios on the 26th March 1953 without producing the bill of lading. They subsequently sold the goods and went bankrupt; the draft was never paid.

The plaintiffs, therefore, instituted these proceedings against the defendants for damages for failure to deliver the goods to them claiming that the goods

consisted of 400 packages, containing salted vegetables, salted eggs, paper, preserved fruits, oyster sauce, cuttle fish and joss sticks worth $29,999.87. As the bank never themselves saw the goods, they are dependent on the evidence of other persons to prove what the packages actually contained. It might be thought that the best evidence as to what the packages contained would be that of the Hong Kong shippers, Sing Yuen, but in fact no evidence was forthcoming from this source. One of the plaintiffs' witnesses sought to explain this omission by saying that Sing Yuen had gone into liquidation after the death of their manager, but he did not say there were no other former members or employees of the firm still alive who could speak to these matters. Perhaps of greater significance was the evidence of the same witness concerning Sing Yuen's business methods when shipping goods to overseas customers. When questioned about a certain item of 30 baskets of salted eggs in the bill of lading, he replied that this description had been given by the shipper to cheat the shipping company, that is to say, the defendants in this action, of their freight. Again when asked about a discrepancy in regard to the quantity of vegetables alleged to have been shipped in this case, he said at first that he could not explain the discrepancy and then added, cryptically but significantly, it might have been to cheat the shipping company. Finally, when questioned about certain differing valuations of salted vegetables, he answered that he was not surprised by such differences because "Sing Yuen were cheating the shipping company of freight." It is clear from this evidence that Thong Lee do not regard Sing Yuen as being a firm of integrity; and they should know as they have been trading with them for eighteen months prior to the present shipment. In the circumstances it is not surprising that the plaintiffs did not call any evidence from Sing Yuen as to the contents or as to the value of the goods which are alleged to have been shipped by them on the Helios.

The plaintiffs, therefore, relied on the evidence of the partners of Thong Lee to prove the contents of these packages. One partner, Gan Eng Kim, said that he had not much experience in the business and admitted under cross-examination that he did not know whether he had received the goods mentioned in the bill of lading. The other partner, Au Teng Yong, said at first that he remembered this particular shipment and that the goods described in the bill of lading were received into Thong Lee's store, but later stated that his firm had received a large number of consignments during 1953, and although he checked them all, it was impossible to remember every cargo. But it was not until the partners of Thong Lee were cross-examined about their activities prior to the arrival of this shipment, that their unreliability, indeed their dishonesty, became apparent. As I have already mentioned, the first step taken by Thong Lee after receiving Sing Yuen's telegram about these goods was to apply to the Import & Export Department for an import permit. The Import & Export Department always insist on the production of a supplier's invoice before issuing a permit, and as Thong Lee did not have a supplier's invoice or anything purporting to be such, they proceeded, with astonishing effrontery, to manufacture one. The manufacturing process was comparatively simple as Sing Yuen had, with remarkable prescience, already provided Thong Lee with a batch of blank invoice forms, with Sing Yuen's name printed both at the top and at the bottom left hand corner. Thong Lee filled in one of these blank invoice forms from the particulars in the telegrams, but as the telegram did not mention any prices, they inserted their own ideas of values. The invoice was, then, to all appearances, a genuine invoice of the Sing Yuen Company of Hong Kong. Thong Lee presented it to the Import & Export Department as a genuine supplier's invoice. It was, of course, nothing of the kind but it deceived, as it was intended to deceive, the Import & Export Department, and enabled Thong Lee to get their import permit on the 24th March, two days before the Helios discharged her cargo in Singapore.

Having got an import permit, the next step was to obtain a letter of indemnity from the Bank of East Asia. Accordingly on the 24th March, Thong Lee submitted a letter of request to the Bank of East Asia asking them to issue a letter of indemnity and in it they set out the list of the goods which they said they were importing from Hong Kong. The details of the goods were the same as those set out in the bogus invoice presented to the Import & Export Department but the value placed on them was vastly different; $9,000 as compared with $24,939.75 in the bogus invoice. Furthermore the details of the goods inserted by Thong Lee in the letter of request, and later in the letter of indemnity issued pursuant to the letter of request, were quite different from those which appear in the bill of lading. It is true the overall number of packages is 400, both in the letter of indemnity and in the bill of lading, but there are glaring discrepancies in the description of the packages making up this total. For instance, the letter of indemnity lists 70 cases of dried olives, 50 cases of mosquito destroyers, 6 packages of brooms and 3 cases of sweet confectionery, but olives, mosquito destroyers, brooms and confectionery are not so much as mentioned in the bill of lading. On the other hand, the bill of lading lists 6 packages of cuttle

fish and 2 packages of paper which are not referred to in the letter of indemnity. Even where the descriptions of the items in the two documents are similar, the quantities are different in every case. The details in the letter of indemnity are based on a telegram despatched by Sing Yuen to Thong Lee giving particulars of the goods purchased on behalf of Thong Lee and the name of the ship carrying them to Singapore; moreover the telegram was sent after the Helios sailed because according to Au Teng Yong "it was invariably the case that telegrams were sent after shipment." It follows, therefore, that the details in the letter of indemnity should tally with those in the bill of lading. But, in fact, every single item is different, either as to description, or as to quantity.

It is abundantly clear that if the onus rests on the plaintiffs to prove what was comprised in this shipment, they have completely failed to do so. But I would go further and say that, even if the bill of lading were held to be *prima facie* evidence that the goods mentioned in it were shipped by Sing Yuen, nevertheless the *prima facie* case has been displaced by the evidence of the plaintiffs' own witnesses. That evidence purports to show, as I have already pointed out, that some items, (namely, olives, mosquito destroyers, brooms and confectionery) were shipped, although they are not even mentioned in the bill of lading; that other items, (namely, cuttle fish and paper), which are mentioned in the bill of lading, were not shipped; that in every instance quantities are different; that the explanation of the discrepancies, or at least of some of them, is that the shipper misdescribed the goods in order to cheat the defendants of freight. In my view, it is impossible, from this mass of contradictory, conflicting and confusing evidence, to arrive at any firm conclusion as to what Sing Yuen shipped to Thong Lee beyond the bare fact that the shipment comprised 400 packages. In my judgment, therefore, the plaintiffs have failed to prove the first issue of fact in this case, namely, the contents of the packages mentioned in the bill of lading.

The second issue of fact concerning the value of the goods can be dealt with more shortly. Insofar as it depends upon the testimony of the partners of Thong Lee, the position is that their evidence is as unreliable on this point as it is on the question of the contents of the packages. They valued the goods listed in Sing Yuen's telegram at $24,939 for the purposes of the bogus invoice, at $9,000 for the purposes of the letter of indemnity and at $17,000 when giving an estimate in the witness box in this Court. It is clear that they are completely unreliable when making valuations for the Import & Export Department and for the Bank of East Asia, and I can see no reason why their valuation should be treated as any more reliable when they are made for the purposes of a claim against the defendants. Nor do the plaintiffs carry the matter any further by the invoice which they say was attached to the bill of lading when it was received by them from Hong Kong since no evidence was called to show how or where this document came into existence. It was no doubt with a view to remedying these weaknesses in the plaintiffs' evidence that the plaintiffs called one of their officers who is a statistician in charge of economic research to give his opinion of the values of these goods. He candidly admitted that it had been very difficult for him to find statistics relating to these different types of goods and that he had been unsuccessful in his search as regards four out of the seven types of produce mentioned in the bill of lading. With regard to the remaining three types, namely, salted vegetables, preserved fruits and salted eggs, he said that there were many varieties of the first two items and many different kinds of packages of the last item and he could not estimate the value of these goods from the information given in the bill of lading. In brief, the plaintiffs' effort to make good the deficiencies in the evidence of the partners of Thong Lee by the evidence of their statistician, failed. The result is that there is no solid reliable evidence upon which to base a firm estimate of the value of these goods, assuming the contents of the 400 packages to be as alleged by the plaintiffs. Accordingly, in my judgment, the plaintiffs have failed to discharge the onus which rests on them of proving the second issue of fact in this case, namely, the value of the packages covered by the bill of lading. The effect of this finding of fact is that the plaintiffs' claim must fail but in view of the lengthy arguments addressed to the Court on certain points of law, I will state my views on those questions.

The questions of law can be summarised under two heads, first, whether the plaintiffs are entitled by virtue of section 1 of the Bills of Lading Act 1855 to sue the defendants on the bill of lading, and secondly, if they are, whether the defendants are estopped by section 3 of the same Act from denying that the contents of the packages were as described in the bill of lading. Apart from statute, the only person entitled to sue a shipowner on a bill of lading is the shipper since he alone has privity of contract with the carrier; but since the Bills of Lading Act

1855 (which applies in the Colony of Singapore) the right to sue is, by section 1 of that Act, transferred to and vested in the person to whom the property in the goods has passed, either by endorsement and delivery of the bill of lading, or by consignment, where the consignee is named in the bill of lading. Ever since the decision in the well-known case of *Sewell v. Burdick*[1] it has been held that the absolute property, is distinct from the special property possessed, for example, by a pledgee, must pass if the provisions of section 1 of the Bills of Lading Act are to apply. The question, therefore, arises whether the plaintiffs were absolute owners or pledgees of these goods and the answer to this question depends on the nature of the transaction between the shippers and the plaintiff bank when the bill of lading and the rest of the shipping documents were handed over to the bank in Hong Kong. The general course of international finance involves the practice of raising money on shipping documents so as to bridge the period between shipment and the time for obtaining payment for the goods and the ordinary law governing transactions of this kind has been explained by Lord Sumner in *The Prinz Adalbert*[2] in the following terms :—

"The usual course of dealing in the export of merchandise and the interest of parties concerned in it suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading, endorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as a drawer, and he further makes the goods, which the bill of lading represents, security for its payment."

This description fits the present transaction except that the shipper, instead of making out the bill of lading to his own order and then indorsing it as in the *Prinz Adalbert*[2] *case*, made it out to the bank's order in the first instance; but this is not a material distinction since either method could be used equally well by a shipper wishing to make the goods security for payment of the draft. It is important to note also that the evidence of the plaintiffs shows that it was the usual practice of Sing Yuen to pledge to a Hong Kong bank the goods which they exported to Singapore. In the course of cross-examination Au Teng Yong said, "When Sing Yuen shipped goods to Singapore. a banker in Hong Kong would pay them for the goods. The goods would be pledged to the bank." In other words, the bank provides credit facilities against security, because that is the business of banking, and does not purchase goods outright, because that is the business of merchants. In my judgment the correct inference from the conduct of the plaintiff bank and Sing Yuen in this case is that. the intention of the shipper was to effect a pledge of the goods to the bank. But if there were any doubt on the matter, it would, in my view, be completely removed by a document issued by the plaintiffs themselves on the 27th June 1953 which states *expressis verbis* that these goods were hypothecated to the bank. This document is as clear an admission as it is possible to have that the plaintiffs were pledgees and not owners of these goods. It follows therefore, upon the authority of *Sewell v. Burdick*[1], that as the plaintiffs are pledgees, they cannot rely upon section 1 of the Bills of Lading Act 1855 and consequently they cannot sue the defendants on this bill of lading.

The plaintiffs sought to rely upon the alternative argument that if they could not sue on the bill of lading because they were pledgees, they could nevertheless recover in tort. The short answer to this argument is that a perusal of the Statement of Claim shows that the plaintiffs have not framed their claim in tort. Even if they had done so, it is by no means certain that they would have had good cause or action in tort, "for the Courts will be astute to find, on principles either of agency or bailment, that the parties to such an action are affected by the terms of the actual contract of carriage" (see *Carver*, 9th edition page 75). It is, however, unnecessary to inquire further into this aspect of the matter as the plaintiffs have clearly not framed their claim in tort but have sued on the contract embodied in the bill of lading.

The second question of law, namely, whether the defendants are estopped by statute from denying the contents of the packages, only arises, of course, if the plaintiffs are entitled to sue on the bill of lading. The estoppel, if it exists at all, arises under section 3 of the Bills of Lading Act 1955 :—

"Every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped. . . . ."

The person signing the bill of lading in the present case was not the defendants but Kin Tye Lung, agents for the defendants in Hong Kong. The plaintiffs contend that the words "person signing" include not only the actual signatory but, where the signatory is an agent, his principal as well, and therefore the defendants are within the ambit of this section. This point was considered in *Thorman v. Burt*[3] where Lord Esher expressed himself as follows :—

"Now I agree that the words 'the person signing the same' do not necessarily mean the person who actually signs. If, for instance, a clerk in a shipowner's office sign *per pro*, the owner might be the person signing within the section. Or, if the captain had the gout, and was thereby prevented from signing himself, and a person signed for him, the captain would be the person signing. But, in the present case, the signature was not that of a mere clerk or servant but of an agent . . . .

Therefore, as the shipowner did not sign the bill of lading in the present case, he incurs no liability under the third section."

Lindley L.J. stated his view more shortly :—

"The bill of lading is signed as follows: 'By authority of the Captain, Wilh. Gasswind, as agent.' That is clearly not the signature of the shipowner who is the person against whom the counter-claim is made. Therefore the argument based upon section 3 of the Bills of Lading Act falls to the ground."

These views are endorsed in *Scrutton* on Charter Parties 15th edition at page 77 in the following terms :—

"The person signing does not mean only the person who actually affixes the signature, but includes a person for whom a clerk or servant signs in a purely ministerial capacity, but not a person for whom an agent who has discretionary powers, such as a master or broker, signs."

The learned editor of *Carver* appears at page 65 of the 9th edition to take a different view from the learned editors of *Scrutton,* but with respect, I am of the opinion that the view expressed in *Scrutton* is more consistent with *Thorman v. Burt*[3] which is the latest authority on the point. In the present case the firm of Kin Tye Lung were not, in my judgment, signing in a ministerial capacity, that is to say, as clerks or servants, but as shipping agents and therefore their signature is not to be treated as the signature of the defendants. Accordingly the plaintiffs' argument under section 3 fails.

The subsidiary questions of law were raised in connection with clause 14 of the bill of lading but they are relevant only if (a) the plaintiffs are entitled to sue on the bill of lading and (b) are not entitled to rely upon a statutory estoppel. Clause 14 provides that "Weight, measure, quality, contents and value, although mentioned in the Bill of Lading, to be considered as unknown to the master .....". The plaintiffs contend that clause 14 gives the defendants no protection in the present case for two reasons; first, because there was a breach in the performance of the contract of carriage in consequence of which the defendants can no longer rely on this clause in the bill of lading; and secondly, the clause is so worded that it applies only to a bill of lading which is signed by the master or by someone on his behalf.

In support of the first point the plaintiffs relied on the cases of *Bontex Knitting Works v. St. John's Garage*[4] and *Lilley v. Doubleday*[5]. These two cases are illustrations of the class of cases, commonly known as "deviation" cases because a great number of them are concerned with contracts of carriage. The principles underlying these cases have frequently been discussed and were again recently considered by Asquith L.J. in *Woolf v. Collie Removal Services*[6], where the learned Lord Justice pointed out that a deviation is a repudiation by conduct of a contract of carriage evincing an intention no longer to be bound to perform the transit voyage. When this occurs, it is open to the party not in default either to treat the contract as at an end or to waive the breach and treat it as subsisting. In the former case, the contract of carriage together with all exceptions and other clauses (apart from an arbitration clause) are abrogated and the carrier cannot rely upon them for his protection; in the latter case, all the terms remain in full force, for it is well settled that an unaccepted repudiation has no legal consequences whatsoever. If, therefore, the plaintiffs could show that the defendants had repudiated the contract in the bill of lading by deviating from the contract voyage and, furthermore, that they had accepted the repudiation, then it would follow that the contract would be at an end and the defendants could not rely on clause 14 of the bill of lading. But there is no allegation anywhere in the Statement of Claim that the defendants deviated from the contract voyage nor is there anything in this case to show that if there was any deviation, the plaintiffs purported to accept it and to treat the contract as at an end. On the contrary, they state in the Statement of Claim that the goods were carried to Singapore and that they will, at the trial of the action, refer to the bill of lading for its full terms. In my judgment, therefore, the principles of the *Bontex case*[4] and *Lilley v. Doubleday*[5] have no application to the circumstances of the present case.

With regard to the argument that clause 14 does not protect the defendants in this case because of its restricted wording, it is certainly curious that it should mention the master and omit all reference to agents, particularly as there are references to both master and agents in other clauses in the bill of lading, showing that the distinction between the two was appreciated and understood by the commercial draftsman who drafted these printed clauses. The defendants contend, however, that clause 14 should be read as if it were worded "unknown to the master or to the agent signing instead of the master" because it is the practice, in the case of carriage on a general ship, for the agents to sign on behalf of the master, or less frequently, on behalf of the owners (see *The Marlborough Hill*[7]) I agree that this is the practice nowadays and that it provides a good reason for amending clause 14 by inserting after the word "master", the words "or to the agent signing instead of the master" or similar words in order that the clause may conform to modern practice. But it is not the function of the Court to amend contracts, however desirable or reasonable it may be that they should be amended, but to construe them and in my opinion it would be amending and not merely construing clause 14, to read into it the

additional words suggested by the defendants. The Court must construe clause 14 as it stands and in my view its meaning may be expressed thus: When a closed package is offered to the master with a representation as to the nature of its contents, the master, when he signs the bill of lading, says, in effect, that he accepts the package as it appears on the outside but he knows nothing about the inside and will not be bound by any statement by the shipper in reference to it. But where, as in the present case, the person accepting the goods and signing the bill of lading does so, expressly, as agent for the shipowner, and not as Master or as agent for the Master, then in my view he does not fall within the words of clause 14. Accordingly if it were necessary to decide the point I would hold that clause 14, as it is now worded, does not protect the defendants where the bill of lading is signed by the shipping agent on behalf of the owners.

However, since the plaintiffs have not established to my satisfaction, either the contents of these packages or their value; and further, have not established their right to sue the defendants under section 1 of the Bills of Lading Act 1855 or to rely upon a statutory estoppel under section 3 of that Act, it follows that their claim fails and there must be judgment for the defendants with costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier; Laycock & Ong.*

WOO CHIN CHONG & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Storr J.) August 25, 1955]

[J. B. — Criminal Appeal No. 19 of 1956]

Criminal trial — Persons prosecuted in mass for an offence — Procedure.

Gaming — Prosecution having evidence rebutting presumption but not using it — Evidence of habitual gaming — Information on oath not produced as exhibit.

Where persons are prosecuted in mass for an offence and the prosecution intended to rely on presumptions against these persons, it is absolutely essential that the investigations are properly carried out and all documents that it is intended to tender as exhibits are correctly translated by a qualified interpreter.

In cases such as gaming, where by doing an act a presumption under the Ordinance is raised against the accused persons, if the prosecution have the evidence which rebuts that presumption in their possession to the knowledge of the accused persons, but do not use it, then it can be said that no presumption properly arises against the accused persons, as the prosecution have not brought out evidence in favour of the accused in their possession rebutting such presumption which they should have done.

The mere fact that one or two persons, not being members of a Club, went to the premises of the Club and stated that they were allowed to play "pai kow" once or twice does not prove that habitual gaming was being carried on.

Search warrants should have been produced by the prosecution to show their right of entry into the premises.

Quaere: Whether on a sworn information, a police officer, after an unsuccessful raid under the Common Gaming Houses Ordinance, can at any time in future raid the same premises?

MAGISTRATE'S CRIMINAL APPEAL.

P. F. de Souza for the appellants.

R. H. Hickling (Federal Counsel) for the respondent.

Storr J. : — This case arose out of a raid by the police led by D. S. P. Pilus on the premises of No. 10, Main Road, Kulai, at 8.35 p.m. on 31st January, 1955 (Chinese New Year). The premises were then occupied by (a) Siong Yap Club, (b) Malayan Chinese Association (Kulai Branch) and (c) Kulai Chinese Chamber of Commerce. There is no doubt that gaming was taking place at the premises at the time of the raid in the front room or main hall. D. S. P. Pilus said that the first 23 accused were found there, although he also stated that the 4th accused opened the door to let him into the premises. In the lounge of the premises were accused Nos. 24, 25, 26, 27 and 28.

The prosecution produced many Chinese documents, none of which were translated or apparently even studied or properly examined to see whether all or some of the accused were members of the Club, the M.C.A., or the Chamber of Commerce, or were on the premises innocently or in connection with the legal objects of the Club, the M.C.A. or the Chamber of Commerce. It was apparently assumed by D. S. P. Pilus that all were there for the purpose of gaming and he apparently relied on the presumptions in the Ordinance to save him what should have been part of his investigation into the case.

It is unfortunate that none of the exhibits produced by the prosecution in this case are properly marked or, for that matter, marked at all by the learned Magistrate or his clerk or Registrar; also none of the Chinese exhibits were translated when tendered. In fact the proceedings were far from satisfactory and one of the main reasons for this was the very poor investigation of this case by the police. In a case such as this, where persons are prosecuted in mass for an offence and the prosecution intended to rely on presumptions against these persons, it is absolutely essential that the investigations are properly carried out and all documents that it is intended to tender as exhibits are correctly translated by a qualified interpreter, especially when